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EMAS KIARA SDN BHD v. MICHAEL JOSEPH MONTEIRO & ORS; FARCOLL ESTATE SDN BHD & ORS (INTERVENERS)

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: 22NCVC-722-06-2012]
B 21 NOVEMBER 2016

CONTRACT: *Sale and purchase of property – Intention of parties – Sale by tender – Whether there was valid offer – Whether there was valid acceptance – Whether subsequent letters superseded previous offer – Parties ad idem on additional terms –* C *Whether there was counter offer – Whether there was concluded contract between parties – Whether contract validly terminated – Whether plaintiff entitled to order for specific performance*

The plaintiff claimed that there existed a concluded contract for the purchase of land and properties ('subject properties') by the plaintiff from the third D defendant ('company'). The first and second defendants were receivers and managers, who were appointed pursuant to the terms of debentures created by the company in favour of a predecessor entity of RHB Bank Berhad, the debenture holder. These debentures secured banking facilities. The company defaulted on these facilities. For the purposes of realising the assets secured E by the debenture, the receivers and managers published an advertisement in a newspaper on 5 May 2011 to seek expressions of interest from the public to purchase the subject properties. An information memorandum dated 5 May 2011 was also issued by the receivers and managers to interested bidders. On 3 June 2011, the plaintiff made an offer of RM60.8 million to F purchase the subject properties. The receivers and managers held a closed tender and invited the persons who had submitted expressions of interest to improve their offers. In response to the invitation from the receivers and managers, the plaintiff increased its offer to RM83.8 million on 17 June 2011. A meeting was held on 28 September 2011 between the plaintiff and G the receivers and managers wherein a number of terms were discussed namely: (i) the subject properties would be sold free only from the encumbrances that had been created in favour of RHB Bank Berhad pursuant to the debentures. Any purchaser would therefore have to bear the risk of any other adverse claim over the properties. In addition, the risk of non-registration of the transfers of the land would have to be borne by the H purchaser, except in respect of the estate lands; and (ii) RHB Bank Berhad would not undertake to refund any money to the purchasers. Mr Lim Litt ('DW1'), a representative of the receivers and managers, further wrote an email to the plaintiff enclosing a copy of another 13 additional salient terms and seeking confirmation from the plaintiff that it was willing to make an I offer based on such terms. On 3 October 2011, the plaintiff wrote to the

receivers and managers informing them that the plaintiff was agreeable to the 13 additional salient terms (which included the two conditions discussed at the meeting). The very next day, the plaintiff again wrote to the receivers and managers, and, on the face of this 4 October 2011 letter, attempted to clarify its earlier letter. On 14 October 2011, the receivers and managers wrote back to the plaintiff, observing that the plaintiff in its earlier 3 October 2011 letter had accepted the 13 additional salient terms and that the 4 October letter sought to impose fresh qualifications. The relevant documents were thereafter provided by the receivers and managers, but unsurprisingly no consensus was reached on the terms of the SPA, given the fundamental difference in the respective parties' positions on whether or not the additional salient terms set out in the 30 September 2011 email applied to the proposed sale and purchase. On 6 December 2011, the receivers and managers informed the plaintiff of their decision to discontinue negotiations. The plaintiff contended that, because of the operation of the law of tenders, the receivers and managers were not entitled to impose the 13 additional salient terms and hence once the receivers and managers communicated their acceptance through the 17 October 2011 letter, a valid contract for the sale and purchase of the subject properties had come into existence, but based entirely on the terms set out in the information memorandum and the plaintiff's second offer of 17 June 2011. The plaintiff, therefore, commenced the present action for specific performance of the sale by tender of the subject properties and also entered a caveat on the subject properties. The defendants, on the other hand, counterclaimed for the wrongful entry of caveats over the subject properties.

Held (dismissing plaintiff's claim; allowing defendants counterclaim):

(1) As of 17 June 2011, the plaintiff had made an offer of RM83.8 million, which offer was capable being accepted to constitute a binding contract. Following the meeting between the plaintiff on 28 September 2011 and DW1's email of 30 September 2011, the receivers and managers sought to obtain an improved offer from the plaintiff containing the 13 additional salient terms. By its 3 October 2011 letter, the plaintiff appeared to have acceded to this request, and indicated its agreement to the 13 additional salient terms. This in law constituted a new offer. Before this new offer was accepted by the receivers and managers, the plaintiff issued its 4 October 2011 letter expressing clarification on the 3 October 2011 letter. This 4 October 2011 letter constituted a new offer that replaced the 3 October 2011 offer, to the extent that the terms of the new offer were different from that contained in the earlier offer. It would follow that, once the 3 October 2011 offer was superseded by the new offer, the earlier offer would not be capable of acceptance. (paras 31-33 & 35)

(2) The effect of the 17 October 2011 correspondence from the receivers and managers was to accept an offer from the plaintiff that was no longer in existence. Although the plaintiff's 3 October 2011 offer expressed its agreement to the additional salient terms, this offer was no longer extant because the plaintiff had changed its mind about accepting the risk of non-registration. In law therefore, the letter of 17 October 2011 was not capable of being a valid acceptance and hence no contract had come into existence as a consequence of the issuance of this letter. At most, it would amount to a counter-offer from the receivers and managers to the plaintiff's offer of 4 October 2011. (paras 38 & 39)

(3) Even if the law of tenders did not permit the receivers and managers to impose terms that were at variance to the information memorandum, the receivers and managers cannot be forced to be bound by terms that they clearly did not accept or agree on. Their only agreement was in respect of the offer of 3 October 2011, which had already been superseded by the time their acceptance was communicated. Hence, the plaintiff's claim for specific performance must necessarily fail, as no contract had come into existence between the parties. (para 42)

(4) The intention of the parties must be construed from the document as a whole, and taking into account the factual matrix of the case. It is clear that the parties did not intend for there to be any contract for the sale of the subject properties until and unless an offer has been accepted by the receivers and managers. On the other hand, it is also clear that the information memorandum was intended to provide for enforceable obligations, in as far as it related to the process by which the subject properties were being tendered for sale. Therefore, the information memorandum formed the basis of a process contract between the plaintiff and defendants. (paras 59 & 60)

(5) Where a new term is proposed in favour of the vendor, it must necessarily amount to an improvement of the offer, whether or not that new term affects the purchase consideration payable. Accordingly, the information memorandum not only did not prohibit the introduction of new terms, but also in fact specifically allowed the receivers and managers to negotiate for their inclusion. The inclusion of the salient terms was for the purposes of assisting the prospective purchasers to price their bids, but this did not prevent the inclusion of additional terms, as it was clear that there could be negotiations at any time prior to acceptance of a bid. For these reasons, the receivers and managers did not commit any breach of the process contract by requesting for the inclusion of the 13 additional salient terms. (paras 65 & 69)

(6) There was a common underlying assumption, *albeit* mistakenly held, that there existed a contract for the sale of the subject properties. However, the plaintiff had not been able to show that it had acted in reliance of that assumption in a manner that would be make it unjust for the court to permit the defendants to deny the truth of that assumption. The plaintiff did not advance any argument to show the existence of any detrimental reliance on the part of the plaintiff. Nor was the evidence led at trial sufficient to satisfy that it would be unjust to permit the defendants to deny the truth of the common assumption. Accordingly, the plaintiff's claim that the defendants ought to be estopped from denying the existence of a concluded contract for the sale and purchase of the subject properties was dismissed. (para 79)

Case(s) referred to:

Amalgamated Property v. Texas Bank [1982] QB 84 ***(refd)***

Blackpool and Fylde Aero Flying Club v. Blackpool Borough Council [1990] 3 All ER 25 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Carlill v. Carbolic Smokeball [1892] EWCA Civ 1 ***(refd)***

Dickson Trading (S) Pte Ltd v. Transmarco Ltd [1987] 1 LNS 139 HC ***(refd)***

Emas Kiara Sdn Bhd v. Michael Joseph Monteiro & Ors; Farcoll Estate Sdn Bhd (Interveners) [2014] 1 LNS 1117 HC ***(refd)***

Emas Kiara Sdn Bhd v. Michael Joseph Monteiro & Ors [2015] 7 CLJ 450 HC ***(refd)***

Harvela Investments v. Royal Trust Company of Canada (CI) Ltd [1986] 1 AC 207 ***(refd)***

Hughes Aircraft Systems International v. Air Services Australia [1997] 146 ALR 1 ***(refd)***

Hyde v. Wrench [1840] 3 Beav 334 ***(refd)***

Martel Building Ltd v. Canada [2000] 2 SCR 860 ***(refd)***

MJB Enterprises v. Defence Construction (1951) Limited [1999] 1 SCR 619 ***(refd)***

Pratt Construction Ltd v. Palmerston North City Council [1995] 1 NZLR 469 ***(refd)***

Pratt Contractors Ltd v. Transit New Zealand [2003] UKPC 83 ***(refd)***

The Queen (Ont) v. Ron Engineering & Construction Eastern Ltd [1981] 1 SCR 111 ***(refd)***

Transit New Zealand v. Pratt Contractors Ltd [2002] 2 NZLR 313 ***(refd)***

Sri Kajang Rock Products Bhd v. Mayban Finance Bhd & Ors [1992] 1 CLJ 204; [1992] 3 CLJ (Rep) 611 HC ***(refd)***

Walton Stores (Interstate) Ltd v. Maher (1988) 164 CLR 387 ***(dist)***

Legislation referred to:

Contracts Act 1950, ss. 2(a), (b), (e), (h), 7

For the plaintiff - Tommy Thomas, Rabinder Singh, Michelle Sunita & Sharifah Izyah; M/s Rabinder Budiman & Assocs

For the 1st-3rd defendants - Cecil Abraham, Benjamin John Dawson, Koh San Tee, Aniz Ahmad Amirudin & Yeoh Jie Hu; M/s Benjamin Dawson

For the interveners - Gideon Tan & Alfred Lai; M/s Gideon Tan Razali Zaini

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JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] The plaintiff, Emas Kiara Sdn Bhd, sued for specific performance in connection with the sale by tender of land and properties that were owned by the third defendant, Lembah Beringin Sdn Bhd. After trial, I dismissed the plaintiff's claim and allowed the defendants' counterclaim for the wrongful entry of caveats over the subject lands. The plaintiff has now appealed against this decision, the grounds for which are set out here.

Background

[2] The background facts of this case, insofar as they were material to the determination of the dispute, are set out in the following paragraphs.

[3] The plaintiff claimed that there existed a concluded contract for the purchase of subject properties by the plaintiff from the third defendant (referred to in this judgment as the company). The subject properties were located in the township of Lembah Beringin and covered an area in excess of 1,400 acres. Comprised in the properties were abandoned developments, residential lots, a golf resort and approximately 1,100 acres of estate lands. The first and second defendants are receivers and managers, who were appointed under and pursuant to the terms of debentures created by the company in favour of a predecessor entity of RHB Bank Berhad, the debenture holder. These debentures secured banking facilities. The company had defaulted on these facilities.

[4] For the purposes of realising the assets secured by the debenture, the receivers and managers published an advertisement in a newspaper on 5 May 2011 to seek expressions of interest from the public to purchase the subject properties. An information memorandum dated on this day was also issued by the receivers and managers to interested bidders.

[5] Several expressions of interest for the properties were received at the close of the period specified for submission of expressions of interest. These include an offer from the plaintiff dated 3 June 2011 for RM60.8 million, and an offer from the interveners for RM50 million.

[6] After considering the expressions of interest, the receivers and managers held a closed tender and invited the persons who had submitted expressions of interest to improve their offers. In response to the invitation from the receivers and managers, the plaintiff increased its offer to RM83.8 million on 17 June 2011 and the interveners increased their expression of interest to RM84.0 million.

[7] On 28 September 2011, a meeting was held between representatives of the plaintiff and Mr Lim Litt (DW1), a representative of the receivers and managers. At this meeting, a number of terms were discussed, including the conditions that:

(a) the subject properties would be sold free only from the encumbrances that had been created in favour of RHB Bank Berhad pursuant to the debentures. Any purchaser would therefore have to bear the risk of any other adverse claim over the properties. In addition, the risk of non-registration of the transfers of the land would have to be borne by the purchaser, except in respect of the estate lands; and

(b) RHB Bank would not undertake to refund any money to the purchasers. This meant that, in the event that the full purchase price was paid but a purchaser wished to claim for refund of any part of the purchase price for whatever reason, the purchaser would have to claim against the company in liquidation (rather than against RHB Bank) and would rank *pari passu* with the rest of unsecured creditors in the company.

[8] It is not in dispute that these terms were not initially included in the information memorandum. Based on the evidence received at trial, these additional terms had been communicated to the interested bidders.

[9] On 30 September 2011, Mr Lim Litt wrote an email to the plaintiff enclosing a copy of the 13 additional salient terms and seeking confirmation from the plaintiff that it was willing to make an offer based on such terms.

[10] On 3 October 2011, the plaintiff wrote to the receivers and managers informing them that the plaintiff was agreeable to the 13 additional salient terms (which included the two conditions discussed in paras. 7(a) and 7(b) *ante*).

[11] The very next day, the plaintiff again wrote to the receivers and managers, and, on the face of this 4 October 2011 letter, attempted to clarify its earlier letter. The plaintiff expressed its view that an agreement for the sale and purchase of the subject properties would have come into existence if, at the expiry of the period specified for the final closed bid, the plaintiff's offer was the highest. In addition, the letter stated that the plaintiff's position was that the bank and the receivers and managers bore the responsibility to ensure that title to the subject properties passed to the plaintiff. This in my view was clearly contrary to the position discussed in the earlier meeting on 28 September 2011, to the terms set out in 30 September 2011 email, and to the terms of the plaintiff's own letter of 3 October 2011.

[12] On 14 October 2011, the receivers and managers wrote back to the plaintiff, observing that the plaintiff in its earlier 3 October 2011 letter had accepted the 13 additional salient terms and that 4 October letter sought to impose fresh qualifications. Based on the evidence received at trial, this letter was only sent out on 18 October 2011.

[13] The receivers and managers also sent a further letter on 17 October 2011, by which they accepted the plaintiff's offer to purchase the subject properties. This letter of acceptance referred to the meeting on 28 September 2011 and to Mr Lim Litt's subsequent email of 30 September 2011, but made no reference to either 3 October 2011 or 4 October 2011 letters from the plaintiff. This letter of acceptance enclosed a draft sale and purchase agreement (SPA). Crucially, this SPA contained terms that reflected the position set out in 30 September 2011 email, which was that the subject properties would be sold free only from the encumbrances that had been created in favour of RHB Bank pursuant to the debentures, and that the risk of non-registration lay with the plaintiff, as purchaser.

[14] Following the receivers and managers' letter of 17 October 2011, correspondence continued to flow between them and the plaintiff. While denying that it was bound by the additional salient terms attached to Mr Lim Litt's email of 30 September 2011, the plaintiff nonetheless sought copies of, among others, documents that were to have been appended to the SPA. The receivers and managers in turn requested that specific comments be provided on the provisions of the draft SPA. The relevant documents were thereafter provided by the receivers and managers, but unsurprisingly no consensus was reached on the terms of the SPA, given the fundamental difference in the respective parties' positions on whether or not the additional salient terms set out in 30 September 2011 email applied to the proposed sale and purchase. This state of affairs continued, until finally on 6 December 2011 the receivers and managers informed the plaintiff of their decision to discontinue negotiations. The plaintiff's bank drafts, which had been furnished as earnest deposits in accordance with the terms of the information memorandum, were all returned to the plaintiff.

Other Cases And Decisions

[15] For completeness, I mention the other reported cases involving the parties hereto. The plaintiff had earlier made an application for an amendment of its statement of claim to include new causes of action (which included conspiracy and breach of trust) but this had earlier been dismissed by the court[1]. Having lost its appeal against this decision at the Court of Appeal, the plaintiff commenced a separate suit (Civil Suit No: 22NCVC-394-08-2014), this time with the additional causes of action added in the plaint. The defendants in that suit applied to strike out the claim, which I allowed[2]. Trial thus commenced on the original cause of action, which was limited to a contractual claim (and, as we shall see, estoppel).

Issues

[16] Mr Thomas for the plaintiff contended that a valid contract for the sale and purchase of the subject properties had come into existence as a result of the acceptance contained in 17 October 2011 letter. This valid contract – argued Mr Thomas – did not contain the additional salient terms because the

receivers and managers were not entitled to introduce new terms to the sale that were not contained in the information memorandum. This was so because of the law of tenders. In addition, it was advanced for the plaintiff that although para. 1.6 of the information memorandum permitted the receivers and managers to negotiate with any parties, this ability was limited to the tenderers improving their offers or the terms of their offers. According to the plaintiff, para. 1.6 could not be construed to permit the receivers and managers to introduce new terms that varied the terms contained in the information memorandum.

[17] Mr Thomas also argued that by their conduct the receivers and managers were estopped from contending that a contract for the sale and purchase of the subject properties did not exist. During the period after the issuance of 17 October 2011 letter, the parties had exchanged correspondence that, in the view of the plaintiff's counsel, could only be construed to mean that a contract had been formed on 17 October 2011.

[18] The defendants maintained that, because there was no concluded contract between the plaintiff and the defendants for the subject properties, the plaintiff did not have any caveatable interest over such properties. The defendants sought the removal of the caveats and for damages occasioned by their wrongful entry.

Summary Of Findings And Decision

[19] The following paragraphs summarise the findings of this court:

(a) there was no agreement reached between the parties as would give rise to a contract that could be made the subject of any claim for specific performance, because:

(i) the "acceptance" by the receivers and managers in 17 October 2011 letter was in respect of an offer that had already been superseded by the letter of 4 October 2011;

(ii) this 4 October 2011 letter, which constituted in law a fresh offer from the plaintiff, had not been accepted by the receivers and managers; and

(iii) the 17 October 2011 "acceptance" from the receivers and managers, at best, constituted a counteroffer from them;

(b) as a matter of the proper construction of the information memorandum, the terms of the information memorandum constituted a process contract that governed the manner in which sale and purchase of the subject properties would be carried out;

(c) this process contract did not, however, preclude the defendants from requesting that offers be made on the basis of the 13 additional salient terms set out in the email of 30 September 2011. Accordingly, there was no breach by the defendants of the terms of the process contract as constituted by the information memorandum;

(d) even though the word estopped or estoppel was not used in the statement of claim, the material facts upon which the plaintiff sought to establish the operation of the doctrine of estoppel in this case have been sufficiently pleaded, and therefore the plaintiff was entitled to raise estoppel in its claim;

(e) although there was a common underlying assumption – mistakenly held – that there existed a contract for the sale of the subject properties, the plaintiff had not acted in reliance of that assumption in a manner that would be make it unjust for the court to permit the defendants to deny the truth of that assumption. Accordingly, estoppel by convention did not apply as against the defendants; and

(f) as a necessary corollary from the dismissal of the plaintiff's claim, the court found that the caveats entered by the plaintiff over the subject properties had been wrongfully entered.

[20] In the light of such findings:

(a) the plaintiff's claim was dismissed;

(b) the defendants' counterclaim was allowed, and damages were directed to be assessed before a Registrar of this court; and

(c) the court directed the plaintiff to pay:

(i) RM200,000 costs to the defendants; and

(ii) RM50,000 costs to the interveners.

[21] The reasons underlying these findings are set out in the following paragraphs.

Whether There Existed A Concluded Contract For The Sale And Purchase Of The Subject Properties

[22] The central plank of the plaintiff's claim lay with the legal effect of 17 October 2011 letter. In my judgment, there was no agreement reached between the parties as would give rise to a contract that could be made the subject of any claim for specific performance.

The Law Relating To Offer And Acceptance

[23] In order for a contract to be enforceable, three requisites must be fulfilled:

> To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that is there must be a consensus *ad idem*; those parties must intend to create legal relations in

the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.[3]

[24] The Contracts Act 1950 explains the difference between a contract and an agreement. Section 2(h) provides that an agreement that is enforceable by law is a contract. Section 2(e) explains that every promise, and every set of promises, forming consideration for each other, is an agreement. In s. 2(b), a promise is said to comprise a proposal that has been accepted.

[25] It will be noted that the terminology used in the Contracts Act 1950 differs from the common law phenomenon of offer and acceptance; under the Act, reference is made to a proposal rather an offer. There is however no real or practical difference in the meaning of these two words. Section 2(a) of the Act explains that when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal.

[26] Thus, an invitation to treat is distinguished from an offer (or a proposal, to use the terminology of the Act) by the fact that the former is not capable of being accepted in order to establish legal relations between the inviter and the invitee.

[27] Section 7 of the Contracts Act 1950 provides that an acceptance must be absolute and unqualified in order for a proposal to be converted into a promise. Thus, if a party purports to accept an offer but introduces a new term in so doing, he would be in reality making a counteroffer, the effect of which would be to destroy the original offer. Such a counteroffer must thereafter be accepted before an agreement could be said to have been put in place. See, for example, *Hyde v. Wrench*[4].

[28] The law thus far recited is trite, and the forbearance of the reader is humbly sought for my having to set out these undisputed principles. What is more contentious, and the subject of the plaintiff's appeal against my decision, is the application of these principles to the facts of the case. This is considered in the following paragraphs.

Was There Acceptance Of The Plaintiff's Offer?

[29] The first observation to be made is that although the information memorandum initially makes reference to the fact that the receivers and managers were seeking "expressions of interest" from interested buyers[5], the terminology used quickly changes to the more conventional formula of offer and acceptance[6]. In my judgment, the expressions of interest that were sought from the buyers were not intended merely as invitations to treat, but were intended to be binding offers that were capable of being accepted by the receivers and managers. That this was so can be seen from various provisions of the information memorandum, for instance, para. 1.8, which sets out the right of the receivers and managers to accept or reject any offer even after the deadline set.

[30] Thus, as of 17 June 2011, the plaintiff had made an offer of RM83.8 million, which offer was capable being accepted to constitute a binding contract.

[31] Following the meeting between the plaintiff and Mr Lim Litt on 28 September 2011 and Mr Lim Litt's email of 30 September 2011, the receivers and managers sought to obtain an improved offer from the plaintiff containing the 13 additional salient terms.

[32] By its 3 October 2011 letter, the plaintiff appeared to have acceded to this request, and indicated its agreement to the 13 additional salient terms. This in law constituted a new offer.

[33] Before this new offer was accepted by the receivers and managers, the plaintiff issued its 4 October 2011 letter. As mentioned in para. 11 *ante*, this letter was expressed as providing clarification on 3 October 2011 letter. However, the substance of the letter amounted to a rejection of the additional condition that the risk of non-registration was to be borne by the plaintiff as purchaser. The main body of this 4 October 2011 letter is reproduced below:

> Further to our letter of EK/Gc/lyh/beringin/006 yesterday we should like to elaborate our statement "we reserve all our rights, expectations and interests accrued herein arising from our bid"
>
> Shortly put we are of the opinion that our rights to the property has arisen after the final closed bid was concluded. If we are the highest bidder at that point then the deal is done.
>
> In that connection and at that point in time your obligation of sale has arisen.
>
> In that context your obligation to deliver good title finally in our name free from encumbrances and caveats arises and this includes removing any existing or potential encumbrance not made known to us. However it will exclude such encumbrances and caveats not caused by the Bank or yourselves in any way whatsoever.
>
> The obligation to see that the land is registered in our name lies with you and the Bank at all materials times. Consequently the question of injunctions and defaults by the Receivers and Managers and/or the Bank resulting in the land not transferable must be remedied by both you and/or the Bank and/or the respective party concerned.

[34] By this letter, the plaintiff appeared to accept the condition that the seller's obligation in as far as the encumbrances were concerned was only to remove the encumbrances that have been put in place by RHB Bank. However, the last paragraph stated the position of the plaintiff that the receivers and managers and the bank were to bear the obligation to ensure that the plaintiff became registered as the legal proprietor of the subject properties. This was clearly contrary to the position of the receivers and

managers that was communicated to the plaintiff in 28 September meeting and 30 September email. This was also contrary to the plaintiff's own 3 October 2011 letter.

[35] In my judgment, this 4 October 2011 letter constituted a new offer that replaced 3 October 2011 offer, to the extent that the terms of the new offer were different from that contained in the earlier offer. It would follow that, once 3 October 2011 offer was superseded by the new offer, the earlier offer would not be capable of acceptance.

[36] Yet this was precisely what the receivers and managers had purported to do. By their letter of 17 October 2011, they purported to accept the plaintiff's offer (without however referring to 3 or 4 October correspondence) and attached the draft SPA to be entered into between the parties.

[37] This draft SPA provided that the obligation of the company as vendor was limited only to the delivery of the documents of title, the memoranda of transfer and copies of the quit rent and assessment receipts, copies of the appointment forms for the receivers and the relevant debentures affecting the subject properties[7]. The SPA also provided that the risk of presentation and registration of the memoranda of transfer was to be borne by the plaintiff as purchaser[8].

[38] The effect of this 17 October 2011 correspondence from the receivers and managers was to accept an offer from the plaintiff that was no longer in existence. Although the plaintiff's 3 October 2011 offer expressed its agreement to the additional salient terms, this offer was no longer extant because the plaintiff had changed its mind about accepting the risk of non-registration.

[39] In law therefore, the letter of 17 October 2011 was not capable of being a valid acceptance and hence no contract had come into existence as a consequence of the issuance of this letter. At most, it would amount to a counter-offer from the receivers and managers to the plaintiff's offer of 4 October 2011.

[40] The 17 October 2011 letter could not be construed as an acceptance of the plaintiff's second offer of 17 June 2011 either, as this offer too would have been superseded, in this case by the offer of 3 October 2011.

[41] Learned counsel for the plaintiff contended that, because of the operation of the law of tenders, the receivers and managers were not entitled to impose the 13 additional salient terms, and hence once they communicated their acceptance through 17 October 2011 letter, a valid contract for the sale and purchase of the subject properties had come into existence, but based entirely on the terms set out in information memorandum and the plaintiff's second offer of 17 June 2011.

[42] In my judgment, this submission overlooks the fundamental position that behind all forms of contract lies the basic concept of assent. A party can only be bound in contract if he has agreed to be bound. The "acceptance" of 17 October 2011 was based on the 13 additional salient terms. Even if the law of tenders did not permit the receivers and managers to impose terms that were at variance to the information memorandum, the receivers and managers cannot be forced to be bound by terms that they clearly did not accept or agree on. Their only agreement was in respect of the offer of 3 October 2011, which had already been superseded by the time their acceptance was communicated. Hence, the plaintiff's claim for specific performance must necessarily fail, as no contract had come into existence between the parties.

[43] At best, the plaintiff's claim could lie in damages, for breach of contract by reason of the operation of the law of tenders. In the following paragraphs, I consider the law of tenders and whether there had been any such breach by the receivers and managers.

The Law Of Tenders

[44] It will be apparent that, thus far, we have been concerned about the existence of the contract for the sale and purchase of the subject properties. In law, where a tender is conducted, there arises the possibility of the existence of another contract governing the manner in which the tender is to be carried out. I refer to this contract as the process contract.

[45] Mr Thomas directed the court's attention to numerous authorities in the Commonwealth where a process contract has been held to exist and where, in some of these cases, the conduct of the person carrying out the tender exercise was held to breach the terms of this process contract. In the interests of brevity, I do not propose to delve into each of them in detail, but I will briefly mention in the following paragraphs the key decisions establishing the applicable principles.

[46] The starting position is the seminal case of *The Queen (Ont) v. Ron Engineering & Construction Eastern Ltd*[9], a decision of the Supreme Court of Canada. This case involved the tender for the construction of water and sewage treatment plant in Ontario, the terms of which provided that the accompanying deposit would be forfeited if a tender was withdrawn or if a tenderer refused to proceed. A construction company submitted a bid in response to the tender, which it discovered had been in error because certain items of costs had not been taken into account in the bid. It duly informed the owner and although the company did not formally withdraw its bid, it requested that its bid not be considered. The owner forfeited the tender deposit and the construction company sued for its return. It was held that the submission of the tender created a binding contract on the tenderer and the

owner was entitled to forfeit the deposit in accordance with the terms on which the tender was submitted. Estey J set out the applicable principles in the following passages:

> Much argument was undertaken in this Court on the bearing of the law of mistake on the outcome of this appeal. In approaching the application of the principles of mistake it is imperative here to bear in mind that the only contract up to now in existence between the parties to this appeal is the contract arising on the submission of the tender whereunder the tender is irrevocable during the period of time stipulated in the contract. Contract B (the construction contract, the form of which is set out in the documents relating to the call for tenders) has not and did not come into existence. We are concerned therefore with the law of mistake, if at all, only in connection with contract A.
>
> The tender submitted by the respondent brought contract A into life. This is sometimes described in law as a unilateral contract, that is to say a contract which results from an act made in response to an offer, as for example in the simplest terms, "I will pay you a dollar if you will cut my lawn". No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in the respondent or in anyone else in or out of the construction world. When a member of the construction industry respond to the call for tenders, as the respondent has done here, that response takes the form of the submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders.

[47] In another decision of the Supreme Court of Canada, *MJB Enterprises v. Defence Construction (1951) Limited*[10], it was held that the process contract (or Contract A, to use the terminology of Estey J in *Ron Engineering*) established an obligation on the owner to accept only conforming tenders. This obligation was an implied term of the contract, which the court inferred based on the presumed intention of the parties.

[48] *Ron Engineering* has been applied in New Zealand. In the case of *Pratt Contractors Ltd v. Palmerston North City Council*[11], a tender had been called for the construction of a flyover. The terms of the tender provided that tenderers would have to pass a qualifying evaluation, and that the tender would be awarded to the lowest tenderer among those who had passed the initial test.

The plaintiff qualified and had provided the lowest tender. The owner however awarded the tender to another party, Higgins, who in its tender had proposed an alternative, cheaper design. The court held that the owner was bound by the terms of process contract and was not entitled to accept the alternative tender on the basis that it was not sufficiently certain and was thus not a conforming tender.

[49] It has to be appreciated that the traditional approach of the courts prior to *Ron Engineering* was to construe a tender as a mere invitation to treat, and that a contract would only be formed once the tender was awarded. Indeed a simple request for bids may well amount to nothing more than a mere invitation. Following *Ron Engineering*, the circumstances may establish the existence of a preliminary process contract:

> Authority makes it clear that the starting point is that a simple uncomplicated request for bids will generally be no more than an invitation to treat, not giving rise to contractual obligations, although it may give rise to obligations to act fairly. On the other hand, it is obviously open to persons to enter into preliminary contract with the expectation that it will lead in defined circumstances to a second or principal contract, along the lines of the analysis in the Canadian cases. Whether or not the particular case falls into one category or the other will depend upon a consideration of the circumstances and the obligations expressly or impliedly accepted.[12]

[50] In this case, the court found that the circumstances established that it was not a mere calling of tenders, as the tender contractors had to pay a non-refundable deposit of $100 to register their interest.

[51] In *Transit New Zealand v. Pratt Contractors Ltd*[13], the New Zealand Court of Appeal explained how it is to be ascertained whether a tender has given rise to a process contract:

> Whether a request for tenders gives rise to a process contract, once a conforming tender is submitted, is in all cases a question of whether all the elements of contractual formation are made out at that point. Analysis of the terms of the invitation to tenders is the starting point, where the request makes no express commitment concerning the manner in which tender received will be addressed, that may indicate the invitation was no more than an offer to receive them. On the other hand, as Blackpool and Fylde Aero Club indicates, the rigorous and comprehensive expression of requirements to be complied with by tenderers may give rise to an implied promise by the invitor to consider a conforming tender if others are considered. The law does not, however, have a policy which inclines towards enforcement of implied promises by invitors, even if they are public bodies, and whether there has been a binding promise as to process is to be ascertained by applying general principles of contract law concerning contract creation and implied terms.

[52] This decision was affirmed on appeal to the Privy Council[14]. A

[53] Before the Privy Council, Transit New Zealand, the owner, had conceded that a duty of good faith exists in connection with the process contract, and so the judicial committee found no need to delve into the finding of the Court of Appeal that, based on the circumstances of this case, there was no implied term of good faith because such inference was not necessary to ensure the business efficacy of the contract. B

[54] Accordingly, depending on the circumstances of a case, the court may find that good faith and fair dealing have been implied into the terms of a process contract. In the present instance of the case before me, there was no need to canvass this issue, as it was not the plaintiff's pleaded case that there had been any breach of any duty of good faith or fair dealing. C

[55] The existence of a process contract in the case of tender exercises has been accepted in England (see *Blackpool and Fylde Aero Flying Club*[15] and *Harvela Investments v. Royal Trust Company of Canada (CI) Ltd*[16]), in Australia (see *Hughes Aircraft Systems International v. Air Services Australia*[17]) and, closer to home, in *Singapore (Dickson Trading (S) Pte Ltd v. Transmarco Ltd*)[18]. The English cases use the term unilateral contract to describe Contract A or the process contract, and synallagmatic contract to describe the mutual agreement entered into with the successful tenderer. I would caution against the description of the process contract as a unilateral contract, due to the particular requirements of our Contracts Act 1950. Under our Act, there has to be privity before a contract can be said to arise, and hence a unilateral contract in the *Carlill v. Carbolic Smokeball*[19] sense should be better construed for our purposes as a universal offer (or to use the terminology of the Act, a universal proposal) rather than a unilateral contract. D E F

[56] In the following paragraphs, I examine whether the tender exercise in the present case gave rise to a process contract, and if so whether the receivers and managers had breached their obligations under the process contract by requiring bids to be submitted on the basis of the 13 additional salient terms. G

Did The Information Memorandum Give Rise To A Process Contract?

[57] In my judgment, as a matter of the proper construction of the effect of the information memorandum, a process contract had come into existence between the receivers and managers on the one hand and each of the offerors on the other. The reasons are as follows: H

(a) firstly, the advertisement carried in the Star dated 5 May 2011[20] had specified that the information memorandum could be obtained by the payment of RM150 to the receivers and managers. Following the decision in *Pratt Construction Ltd v. Palmerston North City Council* this I

would be a pertinent factor to consider in making the determination whether or not the parties had intended for there to be contractual relations between them; and

(b) secondly, viewing the information memorandum as a whole, it will be seen that the document serves two purposes. It is firstly a disclosure document. The recipient of the information memorandum obtains certain information regarding the subject matter of the proposed sale, based on which information he may decide to make further inquiries or undertake due diligence. Secondly, and more significantly, the information memorandum also sets out the procedures to be followed in order for an offer to be made and the consequences that flow following the submission of an offer and its acceptance. These procedures include, for example, the payment of a refundable deposit (amounting to 5% of the offer price), and the circumstances under which this deposit may be forfeited[21]. In my view, the specificity and scope of these procedures suggest that the parties (in particular the receivers and managers) had intended for these procedures to be binding on the parties. (The third function of the information memorandum was to specify some of the terms on which the sale of the properties would be conducted, which will be considered in para. 66 *et seq.*, *post*.)

[58] One potential difficulty with this construction was the terms of para. 2.2 of the information memorandum, which purports to provide that the contents of the information memorandum are not to form the basis of any contract, save and except for certain terms, which will take effect upon acceptance of a successful offer. Paragraph 2.2 is reproduced below:

> 2.2 This IM does not constitute an offer or an invitation. Further, the information contained herein, or any other information or representations supplied to interested parties does not form the basis of any contract save and except to the extent that the terms and conditions stipulated in this IM in respect of the sale of the properties, the signing the sale and purchase agreement and timing thereof, and the earnest deposit shall constitute a binding contract between the Company and the successful offerors upon acceptance of the successful offers by the Receivers and Managers.

[59] The intention of the parties must be construed from the document as a whole, and taking into account the factual matrix of the case. It is clear in my view that the parties did not intend for there to be any contract for the sale of the subject properties until and unless an offer has been accepted by the receivers and managers. On the other hand, it is also clear that the information memorandum was intended to provide for enforceable obligations, in as far as it related to the process by which the subject properties were being tendered for sale, for the reasons explained at para. 57 *ante*. Accordingly, para. 2.2 of the information memorandum should be read

down to mean that it does not constitute an offer to sell the subject properties, and it does not form the basis of any contract to sell the subject properties. This in my view was the only way in which the conflicting clauses can be reconciled.

[60] I therefore found that the information memorandum formed the basis of a process contract between the plaintiff and defendants, at the very least from the time the plaintiff's first offer was received by the receivers and managers and quite possibly also much earlier than that, from the time the RM150 was paid in order to obtain a copy of the information memorandum. I now address the question whether the defendants have breached the terms of the process contract.

Did The Defendants Breach The Terms Of The Information Memorandum?

[61] As previously mentioned, the contention of the plaintiff was that the defendants were not entitled to introduce new terms that were not already contained in the information memorandum. The plaintiff posited that, by requiring the plaintiff to make an offer based on the 13 additional salient terms, the receivers and managers had breached the terms of the process contract.

[62] Whether or not the introduction of the additional salient terms amounted to a breach of the process contract was a matter of the proper construction of the information memorandum. The relevant provisions here are paras. 1.6, 7.0 and 7.13. These are considered in turn.

[63] Paragraph 1.6 provided as follows:

> 1.6 The Receivers and Managers reserve the right not to accept the highest or any of the offers submitted. The Receivers and Managers also reserve the right to negotiate with any party or parties to improve their offers or terms of their offers. The Receivers and Managers are under no obligation or circumstances to disclose to any party or parties the details of the offers received.

[64] It was advanced for the defendants that para. 1.6 contemplated that there be negotiations between the receivers and managers and the offerors, and hence the inclusion of additional terms was expressly permitted. In response, Mr Thomas argued that such right to negotiate was limited only for purposes of getting a party to improve their offers or terms of their offers. It did not include the addition of new terms or the variation of terms already specified in the information memorandum.

[65] I was unable to agree with learned counsel for the plaintiff. In my judgment, where a new term is proposed in favour of the vendor, it must necessarily amount to an improvement of the offer, whether or not that new term affects the purchase consideration payable. Accordingly, para. 1.6 not

only did not prohibit the introduction of new terms, but also in fact specifically allowed the receivers and managers to negotiate for their inclusion.

[66] Paragraph 7 of the information memorandum provided that certain salient terms shall be incorporated in the SPA. These included the term that properties were to be sold "free from encumbrances" (para. 7.5). The term "encumbrance" was not defined in the information memorandum. As we have seen, the receivers and managers sought to limit the term to mean those such encumbrances that have been placed over the properties by RHB Bank under and pursuant to the debentures. In other words, any purchaser would have to take the subject properties subject to any pre-existing interest over the subject properties, of which there could be many, given that the properties included abandoned housing projects.

[67] Paragraph 7.13 further provided that the terms and conditions stipulated in the information memorandum were "non-negotiable and shall be incorporated in the sale and purchase agreement". The contention of the plaintiff was therefore that no further negotiations were permitted in respect of the items set out in para. 7 of the information memorandum.

[68] In my judgment, based a proper construction of the information memorandum, para. 7 merely provides for the minimum terms to be included in the SPA from the perspective of the seller. It would have thus been open to the seller to negotiate for the inclusion of additional terms, consistent with the provision in para. 1.6. In other words, any offer from a prospective purchaser must take into account the minimum terms set out in para. 7, although it would have been open to the receivers and managers to ask for terms that were more favourable to the company, in which event the offeror will have to consider whether it would like to make any adjustments to its offer price to take into account the commercial risk that any such change may pose to the offeror in the event that it is successful in its bid.

[69] It has to be borne in mind that the contemplated sale of the subject lands in the present case differed from typical construction tenders, which were the subject matters in *Ron Engineering, MJB Enterprises v. Defence Construction (1951) Limited, Pratt Construction Ltd v. Palmerston North City Council and Transit New Zealand v. Pratt Contractors Ltd*, discussed *supra.* In these cases, the terms and conditions of the substantive contract (contract B) had been finalised and set out in the tender document, save only for the price. In the present instance, not all of the terms for the sale of the subject properties had been included in the information memorandum. The inclusion of the salient terms in para. 7 was for the purposes of assisting the prospective purchasers to price their bids, but this did not prevent the inclusion of additional terms, as it was clear that there could be negotiations at any time prior to acceptance of a bid.

[70] In this sense, the contemplated sale process in the present case differs from the classic tender process described in the judgment of the Supreme Court of Canada in *Martel Building Ltd v. Canada*[22] (also described by Lord Templeman in *Harvela*[23] as a "fixed bidding sale"). The sale process in the present case is of a class of transactions that are commonly referred to as "auction sales" for those familiar with corporate mergers and acquisitions (although they are not true auctions either). A seller will conduct a vendor due diligence exercise, based upon which a disclosure document (like the information memorandum) is prepared. Interested purchasers may then bid for the asset, and potential buyers may then be shortlisted. Thereafter negotiations may be commenced by the seller with one or more of the shortlisted candidates. Matters such as confidentiality obligations, deposit payment and the manner in which the sale process is to be conducted may be set out in a binding document, which I have referred to as the process contract. The multilateral nature of the process creates competitive tension between the interested purchasers, but does not preclude further negotiations on the terms of the sale on a bilateral basis.

[71] At the same time, just because a transaction is not to be construed as a true tender does not mean that a process contract cannot be said to exist. Whether such contract exists is determined by answering the question of whether all the elements of contractual formation have been made out (per McGrath J in *Transit New Zealand v. Pratt Contractors Ltd*, quoted at para. 51 *ante*).

[72] For these reasons, I found that the receivers and managers did not commit any breach of the process contract by requesting for the inclusion of the 13 additional salient terms.

Whether The Defendants Estopped From Denying That A Contract Existed

[73] The plaintiff's second basis on which it sought specific performance was the contention that by the conduct of the receivers and managers both before and after the 17 October 2011 "acceptance", they were estopped from denying the existence of a contract between the plaintiff and the defendants for the sale of the subject properties. It will be recalled that following 17 October 2011, the plaintiff and the defendants actively engaged in numerous correspondence towards finalising the draft SPA. This fact, according to the plaintiff, showed that a contract had been concluded between them by the acceptance of 17 October 2011. It was not in dispute that negotiations were terminated only on 6 December 2011.

Whether Estoppel Sufficiently Pleaded

[74] It was advanced for the defendants that the plaintiff ought not be permitted from raising estoppel for estoppel was not specifically pleaded by the plaintiff.

[75] In my judgment, the material facts upon which the plaintiff sought to establish the operation of the doctrine of estoppel in this case have been sufficiently pleaded, and therefore it was entitled to raise estoppel. The requirement of the relevant rules on pleadings would be sufficiently satisfied in such circumstances even if the word "estopped" or "estoppel" was not used: see *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd*[24].

The Law On Estoppel

[76] It appeared to me that the species of estoppel that the plaintiff sought to invoke was estoppel by convention, described in *Snell's Equity*[25] in the following terms:

> A useful statement of the doctrine was made by Lord Steyn, and adapted by the other members of the panel of the House of Lords, in *Republic of India v. India Steamship Co Ltd* [1998] AC 878:
>
> > [A]n estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption. It is not enough that each of the two parties act on an assumption not communicated to the other. But … a concluded agreement is not a requirement.[26]

[77] The mere fact that the parties had acted on an assumed state or facts or law would be insufficient to raise estoppel. A plaintiff must show that it had been induced to act in reliance of that assumption such that it would be unjust to permit the defendants to depart from the assumption and assert the contrary. In *Amalgamated Property v. Texas Bank*[27], Lord Denning MR held as follows:

> When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

Estoppel: The Facts

[78] Having reviewed the evidence at trial, it was clear to me that the plaintiff and the receivers and managers were talking at cross purposes, and, as I have held at para. 39 *ante*, there was no meeting of minds on the terms of the sale and purchase of the subject properties. There was therefore no contract. Yet both parties continued to proceed on the basis that one existed:

the receivers and managers believed the plaintiff to be bound by the 13 additional salient terms, in accordance with the discussion on 28 September 2011 and the email of 30 September 2011. The plaintiff on the other hand sought to insist that, while a contract was concluded, the plaintiff was only obliged to adhere to the terms of sale as set out in the information memorandum, and not to the 13 additional salient terms.

[79] I was satisfied in this case that there was a common underlying assumption – *albeit* mistakenly held – that there existed a contract for the sale of the subject properties. However, the plaintiff had not been able to show to my satisfaction that it had acted in reliance of that assumption in a manner that would be make it unjust for the court to permit the defendants to deny the truth of that assumption. The learned plaintiff's counsel's written submissions, which was otherwise comprehensive yet admirably succinct, did not advance any argument to show the existence of any detrimental reliance on the part of the plaintiff. Nor was the evidence led at trial sufficient to satisfy me that it would be unjust to permit the defendants to deny the truth of the common assumption. I accordingly dismissed the plaintiff's claim that the defendants ought to be estopped from denying the existence of a concluded contract for the sale and purchase of the subject properties.

[80] The plaintiff had sought to rely on *Walton Stores (Interstate) Ltd v. Maher*[28], a decision of the High Court of Australia. In this case, the Mahers owned a property with buildings on it, located in a town in New South Wales. They entered into negotiations with Walton Stores to lease the property. For this purpose, Mr Maher proposed to demolish the existing buildings and to erect a new one that met Walton's requirements. In reliance of representations made to him, Mr Maher proceeded to demolish the existing buildings even though Walton had yet to formally execute the lease agreements. Walton changed its mind about the lease but only informed the Mahers after 40% of the new building was completed. The court found that although there was no binding agreement in law between Walton and the Mahers, Walton was estopped from denying that it was bound.

[81] It will be apparent from the facts of *Walton Stores (Interstate) Ltd v. Maher* that, by any measure, it would be unjust to permit Walton to assert that it was not bound by the lease due to the reliance that Mr Maher had placed on the representations given to him that the execution of the lease agreements would be mere formality. The Mahers had incurred considerable cost and expense in not only demolishing the existing buildings but also in constructing the new one in its place.

[82] The facts of *Walton Stores (Interstate) Ltd v. Maher* can thus be clearly distinguished from that of the present case. It may well be that the plaintiff had incurred expenses in pursuit of finalising the terms of the SPA and that it may have lost its bargain for the subject properties. However, these do not, in my view, sufficiently justify the application of the doctrine of estoppel against the defendants. In other words, there would be no unjustness to permit the defendants to assert that no contract of sale existed.

The Counterclaim

[83] It follows as a necessary corollary from the dismissal of the plaintiff's claim that the caveats entered by the plaintiff over the subject properties had been wrongfully entered. I accordingly allowed the counterclaim, and directed that damages be assessed before a Registrar of this court.

[84] For the reasons explained in the foregoing paragraphs, the court gave the orders set out in para. 20, *ante*.

Endnotes:

1. *Emas Kiara Sdn Bhd v. Michael Joseph Monteiro & Ors; Farcoll Estate Sdn Bhd (Interveners)* [2014] 1 LNS 1117; [2014] MLRHU 1365.
2. *Emas Kiara Sdn Bhd v. Michael Joseph Monteiro & Ors* [2015] 7 CLJ 450; [2015] 3 AMR 637; [2015] MLJU 1882; [2015] 4 MLRH 408.
3. per VC George J in *Sri Kajang Rock Products Bhd v. Mayban Finance Bhd & Ors* [1992] 1 CLJ 204; [1991] 3 MLRH 793.
4. (1840) 3 Beav 334.
5. See, for example, paras. 1.2 and 1.3 of the information memorandum, at A1/3 of the trial bundle.
6. See paras. 1.6, 1.7 and 1.8.
7. See cl. 7.8 read together with cls. 7.1, 7.3 and 7.4 of the SPA.
8. See cl. 8, *ibid*.
9. [1981] 1 SCR 111.
10. [1999] 1 SCR 619.
11. [1995] 1 NZLR 469 (HC).
12. per Gallen J, at 478.
13. [2002] 2 NZLR 313.
14. *Pratt Contractors Ltd v. Transit New Zealand* [2003] UKPC 83.
15. [1990] 3 All ER 25 (CA).
16. [1986] 1 AC 207.
17. [1997] 146 ALR 1 (FCA).
18. [1987] 1 LNS 139; [1989] 2 MLJ 408; [1987] 2 MLRH 270.
19. [1892] EWCA Civ 1.

20. at B5/103 of the trial bundles.
21. see para. 7.13 of the information memorandum.
22. [2000] 2 SCR 860 at 908: "To recognise that the [appellant] owed a duty to [the respondent] would be inconsistent with the basic rationale of tendering. As explained in *MJB Enterprises*, *supra*, this rationale seeks to replace negotiation with competition"
23. *op. cit*. footnote 16, at 230.
24. [1995] 4 CLJ 283; [1995] 3 MLJ 331.
25. 33rd edn (2015).
26. *ibid*. at 12-011, footnotes omitted.
27. [1982] QB 84.
28. (1988) 164 CLR 387.